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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1538

WILLIAM C. WESTER,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT FOR THE STATE OF ALASKA

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June 6, 1975

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Page

TABLE OF CONTENTS

OPINIONS BELOW 2
JURISDICTION. 2
QUESTIONS PRESENTED FOR REVIEW 2
CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED 2
STATEMENT OF THE CASE 4
ARGUMENT 6
CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

State v. Baker, 56 Wash.2d 846, 355 P.2d 806 (1960) 8
Christoffel v. United States, 338 U.S. 84, 93 L.Ed. 1826, 69 S. Ct. 1447 (1949) 9

Statutes:

28 U.S.C. Sec. 1257(3) 2
A.S. 28.35.030 . . . . . 3, 4
A.S. 28.35.033(d) 4, 5
7 A.A.C. 30.020(2) 4, 5, 6
7 A.A.C. 30.020(d) 6

Constitutional Provisions:

Amendment 5 2-3
Amendment 14 3

TABLE OF CONTENTS OF APPENDIX

Page

APPENDIX A –

Opinion of the Supreme Court of the State of Alaska, dated 12/6/74 ..... 1a

APPENDIX B –

Amended Judgment, dated 5/24/75 ..... 1b

APPENDIX C –

Judgment on Appeal, dated 2/1/74 ..... 1c

APPENDIX D –

Order of Supreme Court of Alaska, denying Petition for Rehearing, dated 1/7/75 ..... 1d

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No.

WILLIAM C. WESTER,

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v.

STATE OF ALASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT FOR THE STATE OF ALASKA

The Petitioner, WILLIAM C. WESTER, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Alaska rendered in these proceedings on December 7, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Alaska in the above entitled case is attached hereto as Appendix A, No. 1106 and which is not officially reported. The opinions of the District Court for the State of Alaska and the opinion of the Superior Court for the State of Alaska affirming the lower court's decision are attached as Appendix B and Appendix C, respectively.

JURISDICTION

The opinion of the Supreme Court of the State of Alaska was entered on December 7, 1974. See Appendix A. The order denying the petition for re-hearing was entered on January 7, 1975. See Appendix D. The order granting an extension of time in which to file the petition for writ of certiorari was granted on March 28, 1975, and extended the time of filing to June 6, 1975. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Do administrative regulations concerning the procedure for administering breathalyzer tests require a rigid standard of proof of foundational facts before the results of the breathalyzer test are admissible?

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The Constitution of the United States, Amendment 5:

> "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia,

> when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment 14, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute 28.35.030, *Driving While Under the Influence of Intoxicating Liquor or Drugs:*

> "A person who, while under the influence of intoxicating liquor or narcotic drugs, operates or drives an automobile, motor cycle or other vehicle in this state, upon conviction is punishable by a fine of not more than $1,000.00, or by imprisonment for not more than one year, or by both. Upon conviction for a second or subsequent offense in violation of this section, the offenders license and his right to obtain a license to operate a motor vehicle shall be suspended for a period of three years, and this suspension is in addition to any other punishment fixed by the court."

Alaska Statute 28.35.033(d):

"To be considered valid under the provisions of this section the chemical analysis of the persons' breath shall have been performed according to methods approved by the Department of Health & Social Services. The Department of Health & Social Services is authorized to approve satisfactory techniques, methods and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health & Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary."

7, Alaska Administrative Code, 30.020(2), entitled *Procedure for Analysis:*

"The procedures set forth in this section shall be followed to obtain and analyze breath samples by use of the Borkenstein Breathalyzer: (2) observe the subject to be tested for at least fifteen minutes immediately prior to testing to ensure that he does not regurgitate or place anything in his mouth during that period of time;"

STATEMENT OF THE CASE

On April 26, 1972, at approximately midnight, the Petitioner was operating a motor vehicle in a parking lot between Fifth and Sixth Avenues at Fairbanks Street, in Anchorage, Alaska. Subsequently, the Petitioner was charged with violating Alaska Statute 28.35.030 which makes it a misdemeanor to operate a vehicle while under the influence of an intoxicating beverage.

The Petitioner was tried in the District Court for the State of Alaska and on December 19, 1972, the jury found the Petitioner guilty as charged. Final sentencing and judgment were entered on May 24, 1973. See Appendix B.

Alaska Statute 28.35.033(d) requires rigid compliance with the methods of breathalyzer examination approved by the Department of Health & Social Services. 7 A.A.C. 30.020(2) makes as one of the requirements for the breathalyzer examination the requirement that the subject to be tested be observed for at least fifteen minutes immediately prior to testing.

A significant portion of the testimony at the trial was devoted to the admission of the results of the breathalyzer test administered to the Petitioner. The testimony at the trial established that no police officer personally observed the Petitioner for fifteen or twenty minutes prior to the test. However, the court admitted the results of the breathalyzer test into evidence.

The Petitioner appealed the decision to the Superior Court of the State of Alaska which affirmed the lower court's decision. See Appendix C. Subsequently the Petitioner appealed to the Supreme Court of the State of Alaska, whose opinion, which was rendered on December 7, 1974, is attached as Appendix A.

On page 13 of the Supreme Court's Opinion it stated:

"We agree with the appellant in the *Baker* decision that compliance with the fifteen minute observation period prior to the administration of the breathalyzer test as a requirement for the admissibility of the test results. We hold, however, that where substantial compliance with the fifteen minute provision is established on the record as here, a prima facie showing of the foundational fact necessary to establish admissibility is satisfied.

Later on page 14 the court stated:

> "While we do not wish to undermine the status of the observation period as the necessary foundational fact in the introduction of the breathalyzer test results, we do conclude that a rigid standard of proof of this foundational fact is not necessary.

It is from this opinion and decision that the Petitioner has filed this Petition.

ARGUMENT

It is a tenet of criminal law that the prosecution in a criminal case bears the burden of proof of guilt and that the accused is presumed to be innocent until the prosecution establishes every fact to prove his guilt beyond a reasonable doubt. Furthermore, the State has the burden of laying a proper foundation for the admission of evidence against the defendant.

Alaska Statute 28.35.033(d) requires that for the results of the breathalyzer test to be considered valid it must be established that a chemical analysis of breath was performed according to the approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health & Social Services.

7 A.A.C. 30.020(d) which is one of the regulations established by the Department of Health & Social Services requires that the subject to be tested must be observed for at least fifteen minutes immediately prior to testing to insure that he does not regurgitate or place anything in his mouth during that period of time.

During the trial of the Petitioner in the District Court of the State of Alaska the results of the breathalyzer test

administered to the defendant were admitted into evidence and were a substantial part of the State's case against the Petitioner.

However, the testimony at the trial did not establish that Lieutenant Duley, who administered the test, or any other officer had in fact observed the defendant for fifteen minutes prior to the test to assure that he did not eat or drink anything during that period of time.

On page 305 of the transcript, Lieutenant Duley testified beginning at line 20,

> "The . . . of course, the question is always brought up to the officer, has this man been under your observation the required length of time, fifteen or twenty minutes prior to the test. During that time, has he had anything to chew, drink, smoke, etc. He is not allowed to drink eat, smoke for twenty minutes or so prior . . ."

On the following page Lieutenant Duley testified that he personally did not observe the Petitioner fifteen or twenty minutes prior to the test. The transcript does not contain any testimony either by Lieutenant Duley, who administered the breathalyzer test, or Officer Wojciechowski, the arresting officer, that the Petitioner had in fact been observed and that he did not eat or drink anything for fifteen minutes prior to the test. No officer testified that he observed the Petitioner, for fifteen minutes before the test and Lieutenant Duley specifically stated he did not observe the defendant. However, the court admitted the results of the breathalyzer test into evidence in the case.

On appeal to the Superior Court and again on appeal to the Supreme Court of the State of Alaska the Petitioner raised the issue that the court erred in

admitting the results and that as a result of this error the decision should be reversed.

The Supreme Court of the State of Alaska, in its Opinion which is attached as Appendix A, discussed this point at length. It cited the decision in *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960), where the court established four individual points which the State must prove before admitting the results of the breathalyzer test into evidence. In that case the court found that the State must show (1) that the breathalyzer machine was examined and it was in proper working order, (2) that the chemicals used were the proper kind and proportion, (3) that the subject had nothing to eat or drink fifteen minutes before the test, and (4) that the test was given by a qualified operator.

The lower court was aware of this decision and stated that it agreed that compliance with the fifteen minute observation period prior to the administration of the test was a requirement for the admissibility of the results. However, it concluded that a rigid standard of proof of this foundational fact was not necessary to the admissibility of the results.

It is the appellant's position that the State erred in its conclusion that prima facie evidence of each of the testing requirements had been met, was not required prior to the admission of the results of the test into evidence. The Alaska statutes and regulations specifically set forth the procedures that must be established at trial prior to admitting the results into evidence and yet the court admitted the evidence without having proof of each of the foundational facts.

Without the evidence of the results of the breathalyzer test it is doubtful whether the State could have met its burden of proof required in the case. The appellant was

deprived of his right of due process by not requiring the State to make a prima facie showing of the foundational facts necessary to establish the admissibility of the results of the test.

A number of jurisdictions have established that certain foundational facts must be established before admitting the results of the breathalyzer test because the results are easily affected and can be unreliable if the State does not comply with these procedures. Furthermore, the results of the test are an important part of the State's evidence.

In *Christoffel v. United States*, 338 U.S. 84, 93 L.Ed. 1826, 69 S.Ct. 1447 (1949), Christoffel had testified with regard to his political affiliation before the House Committee on Education and Labor and had denied that he was a communist. Christoffel was later indicted for perjury and convicted in trial by jury for violation of §22-2501 of the District of Columbia Code for committing perjury before a "competent tribunal." Christoffel appealed the conviction, contending that the Committee was not a "competent tribunal" since at the time of the responses said to constitute the offense, only six of the twenty-five members of the Committee were present at the hearings. The Supreme Court agreed with the defendant and reversed the conviction:

> "We are measuring a conviction of crime by the statute which defined it. As a consequence of this conviction, petitioner was sentenced to imprisonment for a term of from two to six years. An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal . . . (To convict defendant without a quorum) denies petitioner a fundamental

> right. That right is that he be convicted of a crime only on proof of all the elements of the crime charged against him. A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction." (338 U.S. 90).

This case and other Supreme Court cases have clearly established that the government must prove every fact to be established against the defendant to prove his guilt beyond a reasonable doubt. The same rule should apply that the government must prove every foundational fact required by statute before admitting evidence against the defendant at trial.

The lower court clearly stated in its decision that proof of the foundational facts was necessary but then derogated this rule by stating that prima facie evidence was not necessary. It is the Petitioner's position that this finding is directly contrary to the general rule concerning the government's burden of proof in a criminal case and that it denied the Petitioner his fundamental right of due process. Without the evidence of the results of the breathalyzer test it is very doubtful that the government could have proved beyond a reasonable doubt that the Petitioner was in fact guilty of the crime with which he was charged.

A number of jurisdictions have rendered decisions concerning the admissibility of breathalyzer tests and the standard of proof which the State must meet before such evidence is admissible. However, this court has not determined or set the standard of proof that must be met.

It is the Petitioner's position that the court must require a strict standard of proof in regard to the foundational facts before admitting the results of the test

into evidence and that the lower court's finding to the contrary denied the Petitioner his fundamental right of due process and that therefore, the petition should be granted.

CONCLUSION

The lower court's finding that prima facie evidence of the foundational facts which the government must establish before admitting the results of the breathalyzer test into evidence was not necessary before admitting the results into evidence is contrary to this court's findings that the government must establish each fact and element of the crime beyond a reasonable doubt and denied the Petitioner of his right of due process.

Respectfully submitted,

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June 6, 1975

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

WILLIAM C. WESTER, Appellant, v. STATE OF ALASKA, Appellee.	File No. 2159 *OPINION* [No. 1106– December 6, 1974]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Superior Court Judge, John D. Mason, District Court Judge.

Appearances: Hal R. Horton, Birch, Jermain and Horton, Anchorage, for Appellant. Stephen G. Dunning, Assistant District Attorney, Joseph D. Balfe, District Attorney, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin, Boochever and Fitzgerald, Justices.

BOOCHEVER, Justice.

Based on the manner in which evidence of a breathalyzer test was presented and the sufficiency of that evidence, Wester here challenges his conviction for driving while under the influence of an intoxicating beverage. He was operating a motor vehicle in a parking lot between

Fifth and Sixth Avenues at Fairbanks Street in Anchorage shortly after midnight on April 27, 1972. In an apparent attempt to free the automobile from loose gravel, appellant was rocking it back and forth.

The rocking was observed by Officer John P. Wojciechowski who investigated and found Wester had a strong odor of intoxicating beverage on his breath, glassy eyes and seemed to stumble as he emerged from the vehicle.

After field sobriety tests (finger-to-nose and balance-on-one-foot) were administered, Wester was arrested and charged under AS 28.35.030 for operating a motor vehicle while under the influence of intoxicating beverage. Subsequent to the arrest, he was taken to the police station and a breathalyzer test was given.

The test is well described by the Washington Supreme Court in *State v. Baker*[1] as follows:

> The breathalyzer is a machine designed to measure the amount of alcohol in the alveolar breath and is based upon the principle that the ratio between the amount of alcohol in the blood and the amount in the alveolar breath from the lungs is a constant 2100 to 1. In other words, the machine analyzes a sample of breath to determine the alcoholic content of the blood. . . .
>
> To operate the machine, the subject blows into the machine through a mouthpiece until he has emptied his lungs in one breath. The machine is so designed that it traps only the last 52 1/2 cubic centimeters of air that has been blown into it. This air is then forced, by weight of a piston, through a test ampoule containing a solution of sulphuric acid and potassium dichromate. This test solution has a yellow hue to it. As the breath sample bubbles

[1] 355 P.2d 806, 809 (Wash. 1960).

> through the test solution, the sulphuric acid extracts the alcohol, if any, therefrom, and the potassium dichromate then changes the alcohol to acetic acid, thereby causing the solution to lose some of its original yellow color. The greater the alcoholic content of the breath sample, the greater will be the loss in color of the test solution. By causing a light to pass through the test ampoule and through a standard ampoule containing the same chemical solution as the test ampoule (but through which no breath sample has passed), the amount of the change in color can be measured by photoelectric cells which are connected to a galvanometer. By balancing the galvanometer, a reading can be obtained from a gauge which has been calibrated in terms of percentage of alcohol in the blood.

The jury trial in the District Court, Third Judicial District, resulted in a verdict of guilty as charged. Final sentencing and judgment were entered on May 24, 1973. Appeal was filed and the superior court affirmed on February 1, 1974. Wester thereafter filed a timely appeal to this court, focusing upon three essential steps in maintaining that the breathalyzer test results were inadmissible: (1) the proper calibration of the breathalyzer machine, (2) the certification of the ampules, and (3) the proper administration of the test.

I

ADMISSION OF EVIDENCE AS OFFICIAL RECORDS

Lt. Duley, who conducted the breathalyzer test of Wester, appeared as a witness for the state, but the state did not produce as witnesses the individuals who calibrated the machine and who tested sample ampules. Wester urges that personal testimony regarding the calibration and the certification of ampules is needed to

establish the foundational basis for admission into evidence of the breathalyzer results. The highly technical nature of the data, he contends, necessitates personal testimony. Here Dr. C. D. King, the laboratory technician at the Department of Public Safety, had examined ten ampules bearing the same lot number as that of the ampule used in Wester's examination and certified as to their accuracy. Officer Kohlhase had performed the calibration tests on the particular breathalyzer machine used here. According to Kohlhase's certificate, the calibration tests indicated no deviation from the normal.

The trial court admitted into evidence certified documents including the two authenticated copies of the testing certificates under the official records exception to the hearsay rule. The reliability and trustworthiness of official documents and also the desire to keep officials from having to testify personally in every instance have generally been established as the policies underlying this hearsay exception.[2] In its ruling, the trial court relied on Alaska R. Civ. P. 44(b).[3]

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[2] *See generally* Wigmore, *Evidence* § 1633 (3d ed. 1940) and 2 Wharton's Criminal Evidence, § 290 (13 ed. 1972).

[3] Alaska R. Civ. P 44(b):

Official Records.

(1) *Admissibility.* Writings offered as memoranda or records of acts, conditions, events or findings of fact made by a public official of the United States or a state, territory or jurisdiction of the United States, are admissible as evidence of the facts stated therein, if the court finds that the making thereof was within the scope of the duty of such official; . . .

* * *

(4) *Authentication of Copy.* An official record or an entry therein, when admissible for any purpose, may be

[footnote continued]

Wester maintains that the reliability of the breathalyzer or ampules may not be established by certified documents. In supporting his contention that the proper working order of the machine and chemical mixture of the ampules require very strict proof, Wester cites early cases[4] which evinced an apparent skepticism toward the use of an unfamiliar and technical device.[5] The reliability of the breathalyzer has enjoyed increasing acceptance,[6] however, and chapter 30 of title 7 of the Alaska Administrative Code authorizes and approves the use of the breathalyzer in this state. The Alaska Legislature, furthermore, has specified the foundational facts necessary for the admissibility of a chemical analysis of breath in AS 28.35.033(d).[7] The statute, however, does not

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evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody.

Alaska R. Crim. P. 26(e):

Proof of Records. An official or business record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

[4] Fortune v. State, 377 S.W.2d 381 (Tenn. 1955); State v. Minnix, 137 N.E.2d 572 (Ohio 1956); Hill v. State, 256 S.W.2d 93 (Tex. Crim. App. 1953); People v. Davidson, 152 N.Y.S.2d 762 (N.Y. Co. Ct. 1956).

[5] *See* R. Erwin, Defense of Drunk Driving Cases (1st ed. 1963).

[6] State v. Miller, 165 A.2d 829, 832-33 (N.J. App. 1960); People v. Donaldson, 319 N.Y.S.2d 172, 176 (N.Y. App. 1971); People v. Morris, 311 N.Y.S.2d 53, 56 (N.Y. Dist. Ct. 1970); Pruitt v. State, 393 S.W.2d 747, 750 (Tenn. 1965). *See also* People v. Krueger, 241 N.E.2d 707, 711 (Ill. App. 1968).

[7] AS 28.35.033(d) provides:

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath shall have

[footnote continued]

specify the method of proof of the foundational facts, which is controlled by the applicable rules of evidence. In this case, Alaska R. Civ. P. 44(b) affords a method of proving the calibration of the breathalyzer machine and the certificate of the ampules.

Defense counsel could have inspected the official records in question prior to trial, and if he wishes to challenge their accuracy, he could have taken the deposition of the calibrator and the chemist or called them as witnesses at the trial. He prob ly could also have obtained samples of ampules bearing the same lot number and have had them tested by his own expert.[8]

Wester contends that AS 28.35.033(d) demands rigid compliance with the methods of breathalyzer examination approved by the Department of Health and Social Services. To buttress his claim of the necessity of strict proof of foundational facts, appellant adverts to *Estes v. State*.[9] In that case it was held that a letter written to the police department by the Chief of the Bureau of Identification and Records—stating that the examination

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been performed according to methods approved by the Department of Health and Social Services. The Department of Health and Social Services is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

[8] *See* United States v. Bentvena, 193 F. Supp. 485, 498 (S.D. N.Y. 1960); United States v. Taylor, 25 F.R.D. 225, 227-28 (E.D. N.Y. 1960). *See also* Alaska R. Crim. P. 16.

[9] 283 S.W.2d 52 (Tex. Crim. App. 1955).

of the defendant's blood showed an alcohol content indicating intoxication—and certification of the report by the Assistant Chief of the Bureau of Identification and Records of the Department of Public Safety was inadmissible into evidence over a hearsay objection. It has been argued, however,[10] that *Estes* is illustrative of the mid-1950's cases in which scientific data was viewed askance by the courts and subjected to rigorous demands of proof. The increasing reliance upon and the increasing reliability of scientific devices deflate the status of cases such as *Estes*,[11] insofar as laboratory findings of fact are concerned. The opinion expressed in the *Estes* report as to the defendant's intoxication, however, was not a finding of fact justifying the admissibility of official records, and to that extent we would agree with the result in that case. The distinction as to the type of record admissible under Rule 44(b) is illustrated by our decision in *Menard v. Acevedo*, 418 P.2d 766 (Alaska 1966). In that ruling we held as inadmissible into evidence, in a civil action arising out of a motor vehicle accident, the written report made by an investigating state police officer concerning the accident. That case falls squarely in the mainstream of decisions which have held investigation and accident reports inadmissible. In *Menard* we relied on a statutory proscription[12] bolstered

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[10] *See* R. Erwin, Defense of Drunk Driving Cases (1st ed. 1963), *cited* in People v. Krueger, 241 N.E.2d 707, 711 (Ill. App. 1968).

[11] On the reliability of the breathalyzer and the proposition that expert testimony should not be required to establish that the device is indeed reliable, *see* People v. Donaldson, 319 N.Y.S.2d 172, 176 (N.Y. App. 1971); People v. Morris, 311 N.Y.S.2d 53, 56 (N.Y. Dist. Ct. 1970).

[12] With reference to the investigatory officer's report, AS 28.35.120 provides:

No report made in accordance with this chapter may be used in evidence in a criminal or civil action arising out of the accident that is the subject of the report.

by the general policy that accident reports are often colored by an officer's exercise of judgment and discretion, and many times incorporate opinions and conclusions which may be gathered from random second-hand sources.[13] The documents of King and Kohlhase, however, are clearly not subject to these objections.

More pertinent to the admissibility of the authenticated copies of the certified documents of King and Kohlhase than the cases cited by Wester is the decision of the Oregon Supreme Court in *State v. Woodward*[14] wherein the sole assignment of error on appeal to the Oregon Supreme Court was the admission into evidence of a certified copy of an official record of the Oregon State Board of Health. The objection was based upon hearsay grounds, but the court held the evidence admissible as showing the state's compliance with applicable regulations in regard to the administration of the alcohol breath testing equipment there employed.[15]

The decision was echoed in *State v. Coffman*[16] wherein the court viewed *Woodward* as holding that:

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[13] *Cf.* Commonwealth v. McCloud (Pa. 1974), 15 Crim. L. Rptr. 2455, where it was held that although it was proper to admit an autopsy report into evidence in a homicide case to show the fact of death and that an autopsy had been performed, the report was inadmissible because it included an opinion as to the cause of death, a material element of the crime charged.

[14] 462 P.2d 685 (Ore. 1969).

[15] The court relied on the official records exception to the hearsay rule that was expressly codified in ORS 43.330. *Id.* at 687. *See also* Duff v. State, 503 S.W.2d 785, 787 (Tex. Crim. App. 1974). Officer Kohlhase's document presents the same issue in the instant case.

[16] 502 P.2d 605 (Ore. App. 1972).

> [A] certificate that a certain breathalyzer machine had been tested and found accurate could be received in evidence as an exception to the hearsay rule.[17]

Over a hearsay objection that the particular ampule used did not come from the lot tested, the court in *Coffman*, a driving-while-intoxicated case, admitted a public officer's certificate which stated that the ampules of one lot all bore the same identification number, and one or more of the ampules had been tested. The document objected to was similar to that of Dr. King in the instant case.[18]

With the increasing acceptance and reliability of the breathalyzer has come a relaxation of any notion of rigid proof of foundational facts. In this respect, ampule certification and breathalyzer calibration need not be the subject of personal testimony and are clearly admissible under the official records exception to the hearsay rule. The evidence was not of the direct testing of Wester, but involved results of the tests pertaining to the reliability of the machine and ampules used. Those tests were performed by technicians who should not be compelled to testify in every case: These documents are the exact type that are normally reliable and trustworthy so as to give

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[17] *Id.* at 606 n.1.

[18] The *Coffman* court remarked further that this exception to the hearsay rule was accepted even in State v. Baker, 355 P.2d 806 (Wash. 1960), on which Wester relied heavily and which otherwise toed a line of very strict proof regarding the foundational facts necessary for the admissibility of breathalyzer test results. As support for its ruling, *Coffman* cites: State v. Rines, 269 A.2d 9 (Mc. 1970); State v. Becker, 429 S.W.2d 290 (Mo. App. 1968); State v. Miller, 146 N.W.2d 159 (N.D. 1966); City of Bremerton v. Osborne, 401 P.2d 973 (Wash. 1965). *See also* State v. McKay, 515 P.2d 183 (Ore. App. 1973); State v. Kaser, 515 P.2d 1330 (Ore. App. 1973).

rise to the official records exception to the hearsay rule. The admission into evidence of the authenticated copies of certified documents was not error.[19]

II

THE FIFTEEN-MINUTE OBSERVATION PERIOD

In substance, Wester contends that AS 28.35.033(d) was not complied with in that the breathalyzer test was not performed according to approved methods; and its results, therefore, are inadmissible. The qualifications of the administrator of the examination are set down in 7 AAC 30.030. Lt. Duley testified as to his qualifications and was subjected to cross examination; the court determined Duley to be a qualified operator.

Wester does not here challenge Duley's qualifications, but centers on the specifications of 7 AAC 30.020,[20]

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[19] The trial judge was influenced by the final sentence of AS 28.35.033(d), which states:

> [i]f it is established at trial that a chemical analysis of breath was performed according to approved methods by a person trained according to techniques, methods and standards of training approved by the Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary[,]

in admitting the breathalyzer test results. The testimony of the administrator of the test was clearly necessary to establish the foundational fact that the test was "performed according to approved methods by a person trained according to techniques. . . ." While it is required that a qualified witness explain the functional effect of the chemical testing, personal testimony is not required as to the calibration of the instrument or the accuracy of the ampules. In the instant case, furthermore, the administrator of the test was qualified to inform the jury as to the rationale of the breath test.

[20] A 13-point procedural check list for the blood alcohol analysis is sketched in 7 AAC 30.020.

seeking to demonstrate non-compliance with the 15-minute observation period of 7 AAC 30.020(2).[21] In arguing that the failure to demonstrate compliance with this section dictates the inadmissibility of the test results, Wester points to *State v. Baker.*[22] We agree with appellant and the *Baker* decision that compliance with the 15-minute observation period prior to the administration of the breathalyzer test is a requirement for the admissibility of the test results. We hold, however, that where substantial compliance with the 15-minute provision is established on the record, as here, a prima facie showing of the foundational fact necessary to establish admissibility is satisfied.

Baker, significantly, was a first impression breathalyzer case in Washington. The court there noted that, since the breathalyzer was in its embryonic stage and its results were thought to be unreliable except under rigid testing circumstances, it would require prima facie evidence on each of four points in order to allow into evidence the results of the test.[23] In imposing a stringent 15-minute requirement for admissibility, the court was influenced

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[21] 7 AAC 30.020(2) requires that the tester:

> observe the subject to be tested for at least 15 minutes immediately prior to testing to insure that he does not regurgitate or place anything in his mouth during that period of time;

[22] 355 P.2d 806 (Wash. 1960).

[23] *Id.* at 809-10. The four requirements were: (1) that the machine was properly checked and in proper working order at the time of conducting the test; (2) that the chemicals employed were of the correct kind and compound in the proper proportions; (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within 15 minutes prior to taking the test; and (4) that the test be given by a qualified operator and in the proper manner.

by a number of factors: an obvious hesitancy to embrace the breathalyzer, defendant's own testimony that he had been taking and indeed had medicine in his mouth prior to the administering of the test and the possibility on the record that the observation period may have been only 14 minutes.

While we do not wish to undermine the status of the observation period as a necessary foundational fact in the introduction of the breathalyzer test results, we do conclude that a rigid standard of proof of this foundational fact is unnecessary.[24]

In *Baker* and *Pruitt v. State*[25] cited by Wester as supportive of a strict 15-minute provision, a confluence of factors dictated inadmissibility. Moreover, a more recent case decided by the Washington Supreme Court, *State v. Moore*,[26] suggests a relaxation of the rigors of *Baker*. Conflicting evidence as to whether a cigar was smoked immediately prior to performing the test was not enough to invoke *Baker* and hold the test results inadmissible where the factual effect upon the results of the test was not shown. Wester here has indeed demonstrated the factual effect of ingestion during the quarter-hour observation period, but there is no evidence that appellant had eaten or drunk (or corrupted in any other way the test results) within this period. Lt. Duley was questioned on the 15-minute observation period provision during cross-examination. He indicated that the observation is normally the responsibility of the arresting officer. Although Duley did not personally observe

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[24] *See* People v. Meikrantz, 351 N.Y.S.2d 549 (N.Y. Co. Ct. 1974).

[25] 393 S.W.2d 747 (Tenn. 1965).

[26] 483 P.2d 630 (Wash. 1971).

Wester for 15 minutes prior to the breathalyzer test in the instant case, it is inferable from the record that Wester was under adequate observation by the arresting officer for a sufficient period of time.[27] The mere assertion that ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible.

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[27] Wojciechowski testified that he arrived at the scene of the arrest at approximately 12:10 a.m. and approximately 30 seconds later Duley and perhaps one other officer arrived on the scene and stayed briefly. Wester was given his *Miranda* rights at approximately 12:25 a.m. and subsequently asked a number of questions. Thereafter, Wester was taken to the Anchorage Police Department where the breathalyzer test was then administered at 12:44 a.m. During the 19-minute interim between the recitations of *Miranda* rights and the administration of the breath test, he was taken to the police station and videotaped.

Duley testified as follows on cross-examination:

> Q . . . But you wouldn't, if – he wouldn't have been quite under observation for quite 20 minutes, would he?
>
> A Under my observation?
>
> Q Under anybody's observation?
>
> A Certainly. He was under the officer's observation from the time he left the scene – or as time [sic] the officer arrived at the scene.

Putting aside counsel's suggestion that 20 rather than 15 minutes of observation is needed to satisfy the provision, compliance with the quarter-hour measure and substantiation of Duley's testimony can thus be inferred from the record and the time notations of Wojciechowski and Duley made explicit therein.

III

PROSECUTION UNDER THE STATUTE RATHER THAN THE ANCHORAGE ORDINANCE

Wester contends that to be charged under AS 28.35.030 rather than City of Anchorage Municipal Code 9.28.020[28] when both provisions apply to the same general facts constitutes an arbitrary application of the law violative of constitutional safeguards of equal protection. The argument is without merit.

It is settled that an act may be made a penal offense under state statute, and also made punishable under an ordinance of a municipal corporation.[29] Wester interprets City of Anchorage Ordinance No. 1513[30] as manifesting an intention by the city council to have prosecution rendered under city ordinances when their scope is identical to a state law. But Wester's interpretation is assailable as the ordinance merely acknowledges the sovereignty of the state and does not preclude the state's jurisdiction.

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[28] Formerly, and cited by appellant as, City of Anchorage Ordinance §19-13.02. The penalty provision, §19-13.04, that applies to the ordinance is less severe than its counterpart under the state statute, and this fact serves as the basis of appellant's argument.

[29] Guidoni v. Wheeler, 230 F. 93 (9th Cir. 1916).

[30] City of Anchorage Municipal Code 1.16.030 (formerly Ordinance No. 1513) provides:

> No person shall violate any law of the state of Alaska, nor any rule or regulation adopted by any duly authorized agency of the state of Alaska. Violations of the foregoing shall be violations of this code except where the jurisdiction of the offense is reserved to the state of Alaska.

Hutcherson v. United States[31] involved alleged due process violations as the appellant in that case was indicted and convicted under a federal statute rather than the District of Columbia Code when the measures were identical but for the more serious penalty provision under the federal statute. The court held appellant's argument untenable: "A defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution."[32] This same principle of prosecutorial discretion has been upheld against equal protection challenges.[33]

There was no error by the trial court herein, and the judgment is hereby affirmed.

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[31] 345 F.2d 964 (D.C. Cir. 1965).

[32] *Id.* at 967. *See also* Ehrlich v. United States, 238 F.2d 481, 485 (5th Cir. 1956); Deutsch v. Aderhold, 80 F.2d 677, 678 (5th Cir. 1935).

[33] United States v. Kuch, 288 F. Supp. 439, 452 (D.C.D.C. 1968). *See also* Washington v. United States, 401 F.2d 915, 922-23 (D.C. 1968); *cf.* Berra v. United States, 351 U.S. 131, 100 L.Ed. 1013 (1956) (dissenting opinion).

APPENDIX B

DISTRICT COURT OF THE STATE OF ALASKA
IN THE THIRD JUDICIAL DISTRICT,
AT ANCHORAGE, ALASKA

State of Alaska, Plaintiff

vs. Case No. 72-1426 Cr.

WILLIAM WESTER,
Defendant.

AMENDED JUDGMENT

The Defendant, William Wester, has been brought before me and has been convicted upon (trial) Jury of the crime(s) of OMVI in violation of AS 28.35.030.

It is adjudged that the defendant is guilty as charged, and having been duly convicted, is hereby committed to the custody of the Commissioner of Health and Welfare or his authorized representative for a period of 180 days. It is further ordered that the defendant pay a fine of Five Hundred Dollars ($500.00) or be imprisoned until such fine is paid.

It is ordered that 120 days of the imprisonment and that no Dollars ($) of the fine be suspended and the defendant placed on probation until the _____ day of _____, 19 __, under the following conditions:
1. No similar violations for 1 year. 2. Defendant not to drive in violation of revoked drivers license. License revoked for 3 year, commencing from November 7, 1972. Defendant may apply for limited license in one year. Sentence stayed pending appeal. As a further condition of this probation, the defendant is ordered to

pay the unsuspended portion of the fine on or before the _____ day of _____, 19____ .

Dated and entered this 24 day of May, 1972.

/s/ John D. Mason

Judge

A true copy. Certified _____ , 19 _____

JOHN D. MASON
Judge/Magistrate/Clerk

RETURN

I hereby certify that I received the within Judgment on the _____ day of May, 1973, at Anchorage, Alaska, and that I executed the same by delivering the judgment, or within named defendant, to the jailer of the jail at Anchorage, Alaska on the _____ day of May, 1973.

/s/ Mark Stewart

ALASKA STATE TROOPERS
Title of Officer

COPY TO ACCOMPANY
PRISONER AT ALL TIMES.

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

WILLIAM C. WESTER,
Appellant,

vs.

STATE OF ALASKA,
Appellee,

Case No. 72-693 Cr.

JUDGMENT ON APPEAL

This is an appeal brought by Appellant William C. Wester from a Judgment of the District Court, Third Judicial District, State of Alaska, dated May 24, 1973.

The Appellant alleges error as set out in his Statement of Points on Appeal.

After reviewing the file on this matter and the proceedings in the trial court regarding same, this Court deems itself fully advised in the premises, and finds no reversible error.

IT IS, THEREFORE, ORDERED that the Judgment of the District Court is hereby affirmed.

DATED at Anchorage, Alaska, this 1st day of February, 1974.

/s/ Ralph E. Moody

Ralph E. Moody,
Superior Court Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF ALASKA

WILLIAM C. WESTER, Appellant,	)	
v.	)	File No. 2159 ORDER
STATE OF ALASKA, Appellee.	)	

By direction of the Court, IT IS ORDERED:

The Petition for rehearing is denied.

Dated at Juneau, Alaska, this 7th day of January, 1975.

DONNA SPRAGG PEGUES
/s/ Donna Spragg Pegues
Clerk

FILED
JAN 7 1975
in the
SUPREME COURT of the State of Alaska

cc: Justices, Counsel
Clerk, Anchorage